

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 24132-7-III
)	
Respondent,)	
)	
v.)	Division Three
)	
GABRIEL FIDEL DECOTEAU,)	
)	
Appellant.)	UNPUBLISHED OPINION

KATO, J.—Gabriel Fidel Decoteau appeals his conviction of second degree robbery. He contends the court erred by admitting ER 404(b) evidence and he was denied effective assistance of counsel when his attorney failed to object to hearsay testimony. We affirm.

On August 6, 2004, Mr. Decoteau and his friend, Freddie Silva, were at a mall in Wenatchee. Michael Padilla was shopping there when he looked out a store window and saw Mr. Silva reaching into his car window. Mr. Padilla went out to the parking lot and confronted him. Mr. Silva tried to hit Mr. Padilla, but did not hit him.

Mr. Decoteau then got out of the car and confronted Mr. Padilla. Mr.

Decoteau had a beer bottle in his hand. He tried to hit Mr. Padilla, but missed. When police arrived at the scene, Mr. Padilla told them two Hispanic males had stolen a stereo out of his car. He told the officer the car driven by the men was a black Honda Accord.

Later that evening, a robbery occurred in Wenatchee. Two Hispanic males in a black Honda Accord were involved in the robbery. One of the men shoved a gun into the stomach of the pizza delivery driver, Axle Maldonado, and took a pizza and money bag from him while the other man remained in the car.

During the early morning of August 7, police located the black Honda Accord parked on a street. The registered owner of the car told police it was being used by Mr. Decoteau. Police prepared photo montages. Mr. Padilla and another eyewitness identified Mr. Decoteau as the driver of the car in the incident involving the car stereo. Mr. Maldonado also identified Mr. Decoteau as the driver of the car in the robbery. Mr. Decoteau and Mr. Silva were arrested. Mr. Decoteau was charged with one count of second degree robbery involving Mr. Padilla's car stereo.

Prior to trial, the State sought to admit evidence of the robbery involving Mr. Maldonado. The court admitted the evidence under ER 404(b). The jury

convicted Mr. Decoteau as charged. This appeal follows.

Mr. Decoteau contends the court erred by admitting evidence of the robbery involving Mr. Maldonado. He argues the evidence was highly prejudicial and no aspect of that robbery established any fact in connection with the incident involving Mr. Padilla.

The admission of evidence is within the sound discretion of the trial court. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). We will not disturb its decision on review absent an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence of prior bad acts is not admissible to show propensity to commit a crime, but may be admissible for other purposes, such as to prove motive, opportunity, intent, or to provide a jury with a complete story of the events surrounding the crime as *res gestae* or transaction evidence. ER 404(b); *State v. Trickler*, 106 Wn. App. 727, 732-34, 25 P.3d 445 (2001). Under the *res gestae* or "same transaction" exception to ER 404(b), evidence of other crimes is admissible to complete the story of a crime or to provide the immediate context

for happenings near in both time and place to the crime. *State v. Fish*, 99 Wn. App. 86, 94, 992 P.2d 505 (1999) (quoting *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)), *review denied*, 140 Wn.2d 1019 (2000). Evidence of criminal conduct that is inseparable from a whole criminal scheme is both relevant and admissible. See *State v. Tharp*, 27 Wn. App. 198, 205, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981).

To admit evidence of other crimes or misconduct, a court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value evidence against the danger of unfair prejudice. *State v. Lough*, 125 Wn.2d 847, 852-53, 889 P.2d 487 (1995). Evidence is relevant, and thus admissible, if it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable. ER 401; ER 402. A defendant who commits a string of connected offenses may not force the prosecution to present a “truncated or fragmentary version” of the charged offense by arguing that evidence is inadmissible because it tends to only show the defendant’s bad character. *Lane*, 125 Wn.2d at 832 (quoting *Tharp*, 27 Wn. App. at 205).

Here, the record shows the court heard argument as to whether the robbery involving Mr. Maldonado should be admitted or excluded. The court also heard testimony from Mr. Silva. The State argued that evidence of the subsequent robbery should be admitted under ER 404(b) and under the res gestae exception to ER 404(b). The court balanced the necessary factors before admitting the evidence. The court concluded the evidence was relevant, admissible for reasons underlying the res gestae exception, and was being admitted to establish whether Mr. Decoteau was inadvertently participating in the crimes or whether he had the intent to commit the robbery or participate in it. The court stated:

It's allowing it just as in [*State v. Bythrow*, [114 Wn.2d 713, 790 P.2d 154 (1990)]] whether or not Mr. Decoteau was there inadvertently; whether or not he had the intent to commit the robbery or participate [in] the robbery, which is essentially the same thing the Court found in *Bythrow*.

I also find that under these circumstances that it does involve *res gestae*, what occurred on this particular evening, a couple of young men running around robbing people. And, so, I think that's up to the jury. So the Court will find for those reasons as to its offer to show – because as I understand Mr. Decoteau's defense in this matter, correct me if I'm wrong, Mr. Cassel, but as I understand Mr. Decoteau's defense, it was that, "I'm driving around with Mr. Silva, not intending to commit any crimes at all, and Mr. Silva is committing the crimes."

. . . .

Okay, so the purpose of the testimony is just that, that Mr. Decoteau wasn't there inadvertently; Mr. Decoteau wasn't just driving around having fun on a Friday night, or whatever night this was, is that he was indeed participating in the robberies.

Report of Proceedings (RP) (Feb 2, 2005) at 24-25.

The court then considered the prejudicial effect of the evidence:

In this particular case that's the whole issue in this matter is whether or not Mr. Decoteau was participating in this particular robbery or whether Mr. Silva was out on his own doing whatever it was that Mr. Silva was doing. And, so, although I do believe it's prejudicial, I certainly think the probative value in this case is not only necessary, I think it's outweighed. Outweighs the prejudicial matter.

RP (Feb. 2, 2005) at 26-27.

The robbery involving Mr. Decoteau was likely admissible under the res gestae exception to ER 404(b). In addition to supporting the element of intent for the crimes charged, the evidence likely completed the story and provided an immediate context for happenings near in time to the crime Mr. Decoteau was charged. The court did not abuse its discretion in admitting evidence of the robbery involving Mr. Maldonado.

Mr. Decoteau next contends he was denied effective assistance of counsel. Detective Shawndra Duke testified as to statements made by Mr. Maldonado during her investigation of the robbery. Detective Duke testified:

[Prosecutor]: Okay. And what did Mr. Maldonado explain to you that had happened?

[Detective Duke]: He works part-time as a pizza delivery person for *Pizza Hut* and he explained that he was making a delivery in the 700 block of Walker, as he was getting out of his car with the

pizza to make the delivery, he heard somebody yelling, "Pizza, *Pizza Hut*," so he turned around to see where the noise was coming from and he observed two Hispanic males walking towards a black Honda parked on the opposite side of the street. At that point he observed one of them heading towards the driver's side vehicle and the other one heading toward the passenger side of the vehicle. The passenger then began to approach Mr. Maldonado. He said that the driver, the person standing near the driver's side, had said something in Spanish that was the equivalent of, "Calm down, let's go." But the subject who had been on the passenger side continued to approach Mr. Maldonado and began demanding the pizza from him. Mr. Maldonado asked the subject if he was the one who had ordered the pizza and the subject just continued to demand the pizza. Mr. Maldonado told him, "I'm not going to give you the pizza," at which point that subject pulled a handgun from his waistband and shoved it into Mr. Maldonado's stomach. Mr. Maldonado then gave the pizza to the subject, bread sticks and eventually he gave a bank bag they carry their money in to the subject, as well.

[Prosecutor]: And after the robbery occurred, did he indicate to you how the suspects left?

[Detective Duke]: Right, he told me that the other subject who remained by the car outside, up until the point where his attention turned to the gun, and once the subject had the pizza, the bread sticks and the bank bag, he began walking back to the Honda. At that point the victim, Mr. Maldonado, noticed that the driver was no longer standing outside, he was inside the vehicle starting to pull away from the curb. And the other subject that had been armed with the handgun continued to the vehicle and got inside.

RP (Feb. 2, 2005) at 120-22.

Detective Duke then said on cross examination:

[Defense Counsel]: And he told you that he saw two Hispanic males, which turned out to be Mr. Silva and Mr. Decoteau walking toward a black vehicle?

[Detective Duke]: A black Honda.

. . . .
[Defense Counsel]: And that all of a sudden, turned out to be Mr. Silva, came at him and robbed him?
[Detective Duke]: Eventually, yes.
[Defense Counsel]: And right before that happened Mr. Decoteau was telling Mr. Silva, “Calm down, let’s go.”
[Detective Duke]: Correct.
[Defense Counsel]: And after Silva robbed the pizza man, Mr. Maldonado said he looked over, Mr. Decoteau was in the car and starting to leave without Mr. Silva, right?
[Detective Duke]: That’s not the impression I got.

RP (Feb. 2, 2005) at 124.

On redirect examination, Detective Duke testified:

[Prosecutor]: Okay. And did Mr. Maldonado indicate to you that it appeared to him that the driver of the vehicle was trying to leave Mr. Silva behind?
[Detective Duke]: No. It was the opposite is what he indicated to me.

RP (Feb. 2, 2005) at 126. Mr. Maldonado did not testify at trial and defense counsel did not object to Detective Duke’s testimony.

Mr. Decoteau argues he was denied effective assistance when his counsel failed to object to the detective’s hearsay testimony. To establish ineffective assistance, Mr. Decoteau must show his attorney’s performance was deficient and he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129

Wn.2d 61, 77-78, 917 P.2d 563 (1996). The first element is met by showing counsel's performance was not reasonably effective under prevailing professional norms. *Hendrickson*, 129 Wn.2d at 77. The second element is met by showing a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If either element of the test is not satisfied, the inquiry ends.

Hendrickson, 129 Wn.2d at 78.

There is a strong presumption counsel's performance was reasonable. *Thomas*, 109 Wn.2d at 226. When counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance. *Hendrickson*, 129 Wn.2d at 77-78. "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (citing *Strickland*, 466 U.S. 668), *review denied*, 113 Wn.2d 1002 (1989).

Mr. Decoteau's counsel did not raise any objection to the hearsay testimony. Based on the record, however, the failure to object was a tactical

decision. On cross examination, defense counsel questioned Detective Duke about statements made by Mr. Maldonado. Counsel attempted to use these statements to rebut any claim that Mr. Decoteau was involved in the robbery. Moreover, there is no showing of prejudice. The hearsay statements were not the only evidence linking him to the crime. Through police photo montages, Mr. Decoteau was identified as the driver of the car in both crimes. He has failed to show that, without the hearsay statements, the outcome of the trial would have been different. Defense counsel's failure to object was not ineffective assistance.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, J.

WE CONCUR:

Brown, J.

Kulik, J.